Editor's note: appealed - aff'd, Civ.No. C80-068 (D.Wyo. Aug. 14, 1981)

UNITED STATES OF AMERICA
v.
UTAH INTERNATIONAL, INC.

IBLA 79-297 Decided January 17, 1980

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., holding null and void certain millsite claims. W 29048, W 30586, W 31660.

Affirmed.

1. Millsites: Generally -- Millsites: Determination of Validity -- Millsites: Patents -- Mining Claims: Millsites

   An application for a millsite patent is properly rejected where the applicant can allege only past use of the millsite for mining or milling purposes pursuant to 30 U.S.C. § 42 (1976). An application for a millsite patent is properly rejected where use of the millsite within the terms of 30 U.S.C. § 42 (1976) depends upon the future discovery of minerals.

2. Administrative Authority: Generally -- Millsites: Generally -- Millsites: Patents -- Mining Claims: Millsites -- Patents of Public Lands: Generally -- Public Lands: Jurisdiction Over

   So long as the legal title to public lands remains in the United States, it has the power, after proper notice and upon adequate hearing, to determine whether a millsite claim is valid, and if it be found invalid, to declare it null and void.

Millsites: Generally -- Millsites: Determination of Validity -- Millsites: Patents

An application for a millsite patent is properly rejected where the applicant's use and occupancy of the millsite at the time of application consists only of reclaiming the land.

APPEARANCES: Joseph L. Sweeney, Esq., Reidy & Sweeney, and George M. Straw, Esq., Hochstadt, Straw & Davis, P.C., Denver, Colorado, for contestee. Patricia Boleyn Walker, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Utah International, Inc. (Utah), appeals from a decision of Administrative Law Judge John R. Rampton, Jr., dated February 28, 1979, holding null and void certain millsite claims in T. 28 N., R. 78 W., sixth principal meridian, Carbon County, Wyoming. 1/

On February 24, 1977, the United States filed a complaint against Utah charging that lands embraced within the subject millsite claims were not being used for mining or milling purposes. The complaint prayed that the millsite claims be declared null and void. Negotiations between the parties produced a stipulation of facts obviating a formal hearing. In this stipulation, the parties also agreed that BLM would delete certain claims from the subject contest and process certain other claims to patent. 2/

1/ Wyoming 29048 involves unpatented Shirley Basin millsite claim Nos. 221 through 287 inclusive, situated within sec. 19, 20, 21, 28, 29, and 30, T. 28 N., R. 78 W., sixth principal meridian, Carbon County, Wyoming, designated as Mineral Survey No. 656. On the basis of Judge Rampton's decision, it appears that those claims which were at one time subject to contest W 30586 have been withdrawn from contest, recommended for patent, or adjudicated in an earlier appeal styled Utah International, Inc., 36 IBLA 219 (1978). Wyoming 31660 involves unpatented Shirley Basin millsite claim Nos. 288 through 290 inclusive, 294 through 304 inclusive, 311 through 318 inclusive, 325 through 334 inclusive, 359, 360, and 369, situated within sec. 29, T. 28 N., R. 78 W., sixth principal meridian, Carbon County, Wyoming, designated as Mineral Survey No. 658.

2/ The parties stipulated in part as follows. W 29048: No stipulation in effect. W 30586: East 1/2 of claim Nos. 125 and 146 and all

Utah located the claims at issue in 1969. On June 2, 1971, and thereafter on October 20, 1971, it filed with the Bureau of Land Management (BLM) Land Office in Cheyenne, Wyoming, applications for patent designated W 29048 and W 31660. Some 5-1/2 years later, BLM filed its contest complaint. It is this interval of approximately 5-1/2 years which is at the root of this appeal.

Utah's application for patent is based on 30 U.S.C. § 42(a) (1976) which provides in part: "Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode * * *" (Emphasis supplied.)

In the stipulation of facts mentioned above, the parties set forth in clear terms the issues posed by this statute:

> (1) When is the use of a mill site to be determined -- at the time of the patent application or at the time that title transfers?
>
> (2) If determined at the time of transfer of title, is reclamation or an obligation to reclaim the land surface a valid "mining and milling purpose" within the purview of the statute?

[1] In its statement of reasons on appeal, Utah argues that the use of a millsite claim at the time of application for patent is controlling under 30 U.S.C. § 42(a) (1976). While acknowledging that such a rule of law could be subverted by an unscrupulous locator who uses or occupies a claim for a brief interval at the time of patent application, Utah suggests that BLM could review such patent applications for their good faith. Utah's position would diminish any tendency which BLM might have to delay action on a millsite patent application while the millsite falls into nonuse. It argues that its position is a proper one to counter the case law which insulates BLM from the defenses of laches and estoppel.

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fn. 2 (continued)
of claim Nos. 78, 126, 147, 167, and 186 are withdrawn from contest. Claim Nos. 107, 108, 121-24, west 1/2 of No. 125, 127-29, 142-45, west 1/2 of No. 146, 148, 149, 156-58, 162-66, 168, 169, 174-78, 181-85, 191-96, and 208-13 are recommended for patent. Subject to contestant's request for reconsideration of Utah International, Inc., 36 IBLA 219 (1978), remaining claims should proceed to patent. W 31660: South 1/2 of claim Nos. 310 and 319 and all of claim Nos. 307-09 and 320-22 should proceed to patent.

While this precise legal issue has not been previously addressed by the Board, case law does exist in related areas. For example, in United States v. Skidmore, 10 IBLA 322 (1973), we held that past use of a millsite claim for mining purposes does not satisfy the requirements of section 42(a). Therein, certain millsite claims whose use had ceased some three years prior to patent application were declared null and void. In United States v. Wedertz, 71 I.D. 368 (1964), the Assistant Solicitor held that a millsite whose use depended upon a future discovery of minerals was properly declared null and void. Wedertz was contested, as in the instant case, after filing an application for patent of a millsite located near his several patented mining claims.

[2] In opposition to Utah's position, BLM argues that use and occupancy at the time of patent application is not controlling. It cites Cameron v. United States, 252 U.S. 450, 460 (1920), and Union Oil Co., 65 I.D. 245, 248 (1958), in support of this proposition. In Cameron, Justice Van Devanter, ruling on the validity of a claim located on the southern rim of the Grand Canyon, held at 460: "[S]o long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void." Citing the Cameron decision, Solicitor Bennett wrote: "[T]he issuance of a final certificate did not vest equitable title in the mineral patent applicant, and * * * until the Department had determined that all the requirements of the law had been met, it could entertain a protest and order adversary proceedings against the validity of the claim." Union Oil Co., supra at 248. The Government's brief contains numerous additional citations for this same proposition. Among them: Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337 (1963); West v. Standard Oil Co., 278 U.S. 200, 210 (1929); Ideal Basic Industries, Inc., v. Morton, 542 F.2d 1364, 1367-68 (1976); United States v. Shearman, 73 I.D. 386, 434 (1966).

The principle that the Secretary has the power and duty to determine the validity of a claim so long as patent has not issued would be rendered nugatory if his inquiry into the applicant's use and occupancy were limited to the patent application period. If inquiry were so restricted in the present case, the Secretary would be asked to close his eyes to the fact that Utah no longer uses the subject millsites for waste-dumping purposes. The Secretary would be asked to grant a patent for land which Utah is presently reclaiming.

We agree with BLM and Judge Rampton that an inquiry into use and occupancy of the subject claims cannot be restricted to the patent application period. We are concerned, however, by the fact that BLM may have delayed contesting the subject millsites until they were for all practical purposes useless. Our concern is caused in part by the

fact that an early mineral report by mining engineer Walter C. Ackerman recommended the subject claims for patent, subject to environmental concerns which were dispelled by this Board in Utah International, Inc., 36 IBLA 219 (1978). 3/ Between Utah's application for patent and the Government's contest complaint, some 5-1/2 years elapsed. While this period is not conclusive evidence of intentional delay, it does raise questions in our mind as to BLM's good faith in handling these patent applications.

[3] As its second argument on appeal to the Board, Utah maintains that its reclamation of the millsites, as required by Wyoming law and subject to Federal minimum standards, constitutes use and occupancy of the millsite within the meaning of 30 U.S.C. § 42 (1976). It asks this Board to view reclamation as the final step in the total mining and milling process.

In response, the Government cites to us Alaska Copper Company, 32 L.D. 128 (1903), which states at 131:

> A mill site is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site at the time patent thereto is applied for to come within the purview of the statute. [Emphasis in original.]

To hold that reclamation, which generally consists of leveling, contouring, seeding, watering, and possibly fertilizing the land, is a "function or utility intimately associated with the removal, handling, or treatment of ore" is, we feel, to torture the language of Alaska Copper. We agree with Judge Rampton below that lands undergoing reclamation are not being used or occupied for mining or milling purposes within the meaning of 30 U.S.C. § 42.

3/ This case reversed the Wyoming State Office decision of February 24, 1977, which held that BLM has discretion to issue a patent for a millsite whose use is temporary in nature, all else being regular. Discussed therein are the mineral reports of W. C. Ackerman, Alan J. Ver Ploeg, and Brent S. Bestram.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Rampton is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

James L. Burski
Administrative Judge